

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MICHAEL ADAM ASSENBERG,

Plaintiff,

v.

THERESA McCULLUM, *et al.*,

Defendants.

Case No. C06-987RSL

ORDER DENYING MOTION  
TO AMEND COMPLAINT;  
ORDER OF DISMISSAL

This matter comes before the Court on plaintiff's motion to amend his complaint (Dkt. #11) and on the Court's order to show cause (Dkt. #5, the "Order"). Plaintiff Michael Assenberg, who is proceeding *pro se*, has filed his complaint against Theresa McCullum, the Executive Director of the Anacortes Housing Authority ("AHA"); the State of Washington; the United States Department of Justice (the "DOJ"); the Food and Drug Administration (the "FDA"); and "Washington State HUD." On August 1, 2006, the Court issued the Order identifying numerous deficiencies in plaintiff's complaint and ordering him to file an amended complaint within 30 days or face dismissal. Plaintiff subsequently filed a motion to recuse and a motion to appoint counsel. Those motions were denied. The Court now considers its order to show cause and plaintiff's motion to

1 amend his complaint.<sup>1</sup>

2 Leave to amend “shall be freely given when justice so requires.” Fed. R. Civ. P.  
3 15(a). The Court should consider four factors in deciding whether to grant leave to  
4 amend: “bad faith, undue delay, prejudice to the opposing party, and the futility of  
5 amendment.” Kaplan v. Rose, 49 F.3d 1363, 1370 (9th Cir. 1994). A proposed  
6 amendment is futile if it could be defeated by a motion to dismiss or if plaintiff cannot  
7 prevail on the merits. See, e.g., Smith v. Commanding Officer, 555 F.2d 234, 235 (9th  
8 Cir. 1977).

9 In this case, amendment would be futile because the proposed amended complaint  
10 does not cure the deficiencies previously identified by the Court. Plaintiff continues to  
11 assert claims that he brought, and the Court dismissed, in his prior lawsuit. Assenberg v.  
12 Anacortes Housing Authority, C05-1836 (W.D. Wash. 2005) (“Assenberg I”). Plaintiff’s  
13 allegations of constitutional violations are based on his assertion that the state’s medical  
14 marijuana law grants him an unfettered right to use marijuana in federally subsidized  
15 housing; the Court rejected that claim in Assenberg I. Plaintiff is barred from relitigating  
16 those issues and claims.

17 The Order also noted that plaintiff had not shown a basis for this Court’s  
18 jurisdiction over his purely state law claims against Theresa McCullum.<sup>2</sup> Plaintiff’s  
19 amended complaint does not assert any federal claims against her. In the Order, the

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21 <sup>1</sup> The Court has also considered plaintiff’s “answer to the court” and plaintiff’s  
“amended info for the Court to take notice.”

22 <sup>2</sup> McCullum has filed a “Memorandum in Support of Court’s Order to Show  
23 Cause” in which she requests that the Court exercise supplemental jurisdiction over the  
24 state law claims against her and dismiss them with prejudice. The Court declines to do so  
25 because McCullum did not file her request as a motion and plaintiff did not have an  
opportunity to respond to it.

1 Court also explained that “[p]laintiff’s allegation of sex discrimination appears based on  
2 the conduct of third parties, not of Ms. McCullum.” In response, the amended complaint  
3 states that McCullum engaged in slander by informing AHA’s attorneys that plaintiff was  
4 “born both genders.” Plaintiff, however, does not allege that the statement was false, and  
5 he has included the information himself in public filings before this Court.

6 Similarly, although the Order notified plaintiff that Washington state and its  
7 agencies are immune from suit under the Eleventh Amendment, plaintiff does not allege  
8 any basis for overcoming that immunity. The amended complaint also did not address the  
9 Order’s statement that even if immunity did not apply, “Washington State HUD” does not  
10 appear to exist as an entity.

11 Plaintiff’s amended complaint contains new allegations against the DOJ based on  
12 his mistaken belief that it employs this Court and “State Judge Meyers” (collectively, the  
13 “judges”). Plaintiff alleges that the judges violated his due process rights as well as his  
14 rights under the 4th, 8th, and 10th Amendments. Even if the DOJ employed the judges, it  
15 is immune from suit for money damages under the doctrine of sovereign immunity.  
16 Plaintiff has not named the judges as defendants, and even if he had, they are entitled to  
17 judicial immunity. See, e.g., Mirles v. Waco, 502 U.S. 9, 11-12 (1991) (explaining that  
18 judges are absolutely immune from civil damages liability for acts performed in their  
19 judicial capacities).

20 Finally, plaintiff’s amended complaint alleges that the FDA’s recently released  
21 statement on the lack of medicinal properties of marijuana is a “GROSS misuse of federal  
22 power.” Amended Complaint at p. 2. Like the DOJ, however, sovereign immunity  
23 protects the FDA from a suit for damages. Plaintiff has not asserted any basis for a  
24 waiver of sovereign immunity in this case. Plaintiff also seeks injunctive relief “stopping  
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1 the FDA from allowing the Sick a right to access of Medication that works.” Amended  
2 Complaint at p. 5. That request is apparently based on plaintiff’s allegation that the  
3 “FDA is Violating their own guidelines when it comes to listing Marijuana as a Class I  
4 drug.” Id. However, as the Court noted in the Order, marijuana is classified as a  
5 Schedule I drug in the Controlled Substances Act, 21 U.S.C. § 812, and the FDA is not  
6 responsible for its classification or for enforcement of the Act.

7 Although plaintiff’s amended complaint is fatally deficient, he is not without a  
8 remedy. Plaintiff can pursue his allegations regarding this Court’s dismissal of  
9 Assenberg I in his appeal currently pending before the Ninth Circuit Court of Appeals.

10 Accordingly, for all of the foregoing reasons, plaintiff’s motion to amend his  
11 complaint (Dkt. #11) is DENIED and this action is DISMISSED.

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13 DATED this 2nd day of October, 2006.

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16 Robert S. Lasnik  
17 United States District Judge  
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